UEM LAND SDN BHD v. MENTERI KEWANGAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-185-05-2021]
27 MARCH 2023

Abstract – *An application to quash a decision by a decision-maker not to make a decision must be accompanied by an order of mandamus to compel the decision-maker to make a decision on the matter. Without the accompanying order of mandamus, the applicant is only left with 'no decision' made by the decision-maker. In the instant case, if the decision not to make a decision, ie, decision not to exercise powers under ss. 135 and/or 127(3A) of the Income Tax Act 1967 ('ITA') is quashed, an order of mandamus to compel the Minister of Finance to exercise his powers must follow. However, no order of mandamus could be made in this case as ss. 135 and 127(3A) of the ITA confer discretionary power, and not a duty, on the said Minister.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Applicant submitted request to Minister of Finance ('Minister') to give Director General of Income Tax directions and/or to exempt notices of assessments – Non-response by Minister – Non-response treated as rejection of request – Whether Minister made decision on request – Circumstances where non-response amounts to 'refusal to make a decision' – Whether there was no decision to qualify as 'refusal to make a decision' susceptible to certiorari – Whether Minister had power to act on applicant's request – Income Tax Act 1967, ss. 127(3A) & 135*

ADMINISTRATIVE LAW: *Judicial review – Mandamus – Applicant submitted request to Minister of Finance ('Minister') to give Director General of Income Tax directions and/or to exempt notices of assessments – Non-response by Minister – Non-response treated as rejection of request – Order sought in nature of mandamus – Whether mandamus could be issued – Income Tax Act 1967, ss. 127(3A) & 135*

The applicant had entered into an agreement with the Johor State Government, where the applicant must (i) sell lots to Bumiputera purchasers with a discount on the sale price offered to the general public; and (ii) offer to the public a certain percentage of the total properties contained within each development as low-cost medium-cost units. The applicant requested, and the Johor State Executive Council agreed, to waive and exempt the Bumiputera quota and low-cost requirement for properties to be constructed in the developments. The Director General of Inland Revenue ('DGIR') had requested the applicant to furnish documentation for the purpose of assessing the payment of tax made in the years 2013 to 2018. Upon the documents being furnished, the DGIR informed the applicant that its claim for deduction, for the release of Bumiputera quota and low-cost construction,

was disallowed as it did not fall under s. 33(1) of the Income Tax Act 1967. The DGIR disagreed with the explanation proffered by the applicant and proceeded to issue notices for years of assessment 2013, 2014 and 2015 in the amounts of RM970,801.20, RM4,184,682.80 and RM3,331,448.40 ('assessments'), respectively. The applicant submitted a request to the Minister of Finance ('Minister') to give the DGIR directions, under s. 135 of the ITA, and/or to exempt the notices that were raised pursuant to the assessments, under s. 127(3A) of the ITA. As the Minister did not respond, the applicant treated such non-response as a rejection of the said request. Hence, the present application for leave to commence judicial review, where the applicant sought: (i) an order for the Minister to exercise his powers under ss. 135 and/or 127(3A) of the ITA to set aside the notices made by the DGIR on the ground that the assessments were illegal, void, unlawful and/or in excess of authority, irrational and/or unreasonable and resulted in breach of the applicant's legitimate expectation ('first principal relief'); and (ii) a declaration that the contribution amount for the release of the Bumiputera quota and low-cost construction was deductible under s. 33(1) of the ITA ('second principal relief').

Held (dismissing application):

(1) To obtain leave, the applicant has a threshold to clear and the threshold is very low. Leave will be refused if (i) the application is frivolous or vexatious. If the application is not frivolous or vexatious, the next question is to ascertain whether the applicant had shown an arguable case to obtain the relief sought at the substantive stage; (ii) no success is envisaged at the substantive hearing; and (iii) the subject matter for review is not amenable to judicial review. The applicant failed to clear the low threshold test for leave to be granted. (paras 9-13)

(2) The opening words of the first principal relief were 'an order for the Minister to exercise his powers'. The powers referred to were housed in ss. 135 and 127(3A) of the ITA. The use of such words was to compel the Minister to exercise the said powers and in the manner dictated by the applicant. The said order was, in substance, an order in the nature of *mandamus*; it was certainly not an order for *certiorari*. An order of *certiorari* is to quash the legal effect of a decision and this was not made out by the words employed in the relief sought. The order, as framed, was an order in the nature of *mandamus* which could not, in law, be granted on the face of what had been pleaded by the applicant. As such, there was no arguable case for the first principal order to be investigated at the substantive stage. The reason the order could not be granted was because the *mandamus* did not lie to perform a discretionary power and only lies where the applicant has a legal right to compel the performance of a duty provided in the statute. The use of the word 'may' in both sections conferred discretionary power, and not a duty, on the Minister. (paras 15 & 16)

(3) The Minister did not make a decision, as requested by the applicant, in the letter not replied to and it was the applicant who treated the non-reply as a decision by the Minister rejecting the said request. There was no inordinate delay on the part of the Minister and therefore, there was no decision by the Minister not to make a decision. The Minister was only given 14 days to respond and the judicial review application was filed two days after the deadline imposed by the applicant had passed. This timeframe did not evince a clear determination on the part of the Minister not to comply with the request. There was no clear evidence of the Minister's refusal to make a decision. To take the date when the application for leave was heard was fallacious in view of the fact that the Minister was already served with the instant application for leave. In the circumstances, there was no decision to qualify as a 'refusal to make a decision' which was susceptible to *certiorari*. (paras 14, 23 & 30)

(4) The Minister had no power to do what the applicant was requesting him to do under ss. 135 and/or 127(3A) of the ITA. There could be no arguable case given that s. 135 of the ITA does not envisage the Minister giving directions to the DGIR to set aside the assessment which, under the provisions of the ITA, is expressly within the jurisdiction of the Special Commissioners of Income Tax or the High Court. Further, s. 127(3A) of the ITA does not envisage granting exemptions in respect of illegal and/or unlawful tax. Therefore, there was no basis to grant the second principal relief against the Minister. (paras 35 & 41)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Karpal Singh Ram Singh v. Ketua Hakim Negara [2011] 4 CLJ 179 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor [2009] 5 CLJ 518 CA ***(refd)***

Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 540 SC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja [2013] 1 LNS 280 CA ***(refd)***

National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue [1993] 4 CLJ 339 SC ***(dist)***

Peguam Negara v. CMMT Investment Limited (Civil Appeal No. W-01 (IM)-575-10-2021) (Unreported) ***(refd)***

A *R v. Central Professional Committee for Opticians [1949] 2 All ER 519* ***(refd)***
R v. Secretary Of State For The Home Department, Ex p Rukshanda Begum [1990] COD 107 ***(refd)***
Re Bukit Sembawang Rubber Co Ltd v. Sembawang Estates Ltd [1961] 1 LNS 102 ***(refd)***
Tan Sri Musa Hj Aman & Ors v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Ors [2021] 3 CLJ 87 CA ***(refd)***
B *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA* ***(refd)***
Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors [2010] 1 LNS 1390 HC ***(refd)***
Tuan Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***
C *United Allied Empire Sdn Bhd v. Pengarah Tanah Dan Galian Selangor & Ors [2017] 8 CLJ 173 CA* ***(dist)***
Winsome Al-Yatama Sdn Bhd & Anor v. Pentadbir Tanah Kota Tinggi [2015] 9 CLJ 110 HC ***(refd)***
Workon Sdn Bhd v. The Director Of Lands And Surveys, Sabah & Ors [1999] 1 LNS 40 HC ***(refd)***
D *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC* ***(refd)***
Zainal Hj Nasiruddin v. The Registrar Of Societies [2012] 1 LNS 939 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, Schedule para 1
Federal Constitution, art. 96
E Income Tax Act 1967, ss. 33(1), 99, 100, 101, 102, 127(3A), 135, Schedule 5 para 34
Land Acquisition Act 1960, s. 4(1)
Rules of Court 2012, O. 53

Judges' Code of Ethics 2009, s. 13

Other source(s) referred to:
F MP Jain, *Administrative Law of Malaysia and Singapore,* 4th edn, p 615

For the applicant - S Saravana Kumar & Dharshini Sharma; T/n Rosli Dahlan Saravana Partnership
For the respondent - Nik Isfahanie Tasnim Wan Ab Rahman; FC

G *Reported by Najib Tamby*

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

H **[1]** On 13 March 2023, I dismissed the application for leave to commence judicial review proceeding by the applicant, UEM Land Sdn Bhd against the Minister of Finance ("the Minister") for the following principal reliefs (stated in encl. 1):

I (i) an order for the Minister to exercise his powers under s. 135 and/or s. 127(3A) of the Income Tax Act 1967 ("ITA") to set aside or exempt the notice of assessment made by the Director General of Inland

Revenue ("DGIR") for the years of assessment ("YA") 2014 and notices of additional assessment for the YA 2013 and 2015 all dated 30 April 2021 ("the assessment") on the ground that the assessments were illegal, void, unlawful and/or in excess of authority, irrational, and/or unreasonable and resulted in breach of the applicant's legitimate expectation ("first principal relief").

(ii) declaration that the contribution amount for the release of the Bumiputra quota and low-cost construction ("the contribution") is deductible under s. 33(1) of the ITA ("second principal relief").

[2] I now state the reasons for my decision.

The Background Facts

[3] The following salient facts averred in the affidavit verifying facts give context to the filing of the instant application for leave. The applicant is a company incorporated in Malaysia principally engaged in the business of property development, property investment, project procurement and management and strategic holding. On 10 April 2014, the applicant entered into an agreement with the Johor State Government whereby the applicant must sell lots to Bumiputera purchasers with a discount on the sale price offered to the general public. The applicant was also to offer to the public a certain percentage of the total properties contained within each development as low-cost medium-cost units.

[4] As means to encourage direct foreign investments through the sale of residential, commercial, recreational, educational and industrial properties, the applicant requested from the Johor State for the waiver and exemption of the Bumiputra quota and low-cost requirement for properties to be constructed in the developments. The Johor State Executive Council agreed to the request made by the applicant in return for payments made to the Johor State Government. Prior to the execution of the agreement, both the applicant and the Johor State Government signified their intention to enter into a formal agreement by an exchange of letters of undertaking dated 1 June 2021 and 20 June 2012, respectively.

[5] By way of a letter dated 18 September 2020, the DGIR requested the applicant to furnish documentation for the purpose of assessing the payment of tax made in the year 2013 to 2018. Upon the documents being furnished, the DGIR by way of a letter dated 7 April 2021 informed the applicant that the applicant's claim for deduction for the release of Bumiputra quota and low-cost construction is disallowed as it does not fall under s. 33(1) of the ITA. On 28 April 2021, the applicant proffered an explanation with supporting documents contradicting the DGIR's position. The DGIR disagreed with the applicant and issued notices of assessment as follows: (i) YA 2013 an amount of RM970,801.20; (ii) YA 2014 an amount of RM4,184,682.80; and (iii) YA 2015 an amount of RM3,331,448.40 ("the assessments").

[6] On 6 May 2021, the applicant submitted a request to the Minister to give the DGIR directions under s. 135 of the ITA and/or to exempt that were raised pursuant to the assessments under s. 127(3A) of the ITA. The Minister did not respond to the applicant's request. The applicant averred (para. 11 of the affidavit in support of the leave application) that the Minister's failure to respond is treated as a rejection of the applicant's request under s. 135 of the ITA and/or s. 127(3A) of the ITA.

[7] On 19 May 2021, the applicant filed this application for leave to commence judicial review for the reliefs stated above.

Grounds For Judicial Review

[8] The grounds in support for the reliefs sought in the application were stated in the O. 53 statement as follows:

(i) the decision of the Minister was illegal, void, unlawful and/or in excess of authority on account of the Minister failing to take the following matters into account:

(a) that the DGIR had acted arbitrarily and exceeded his authority when he failed to consider that s. 33(1) of the ITA explicitly provides that any expenses incurred wholly and exclusively in the production of the taxpayer's income are deductible;

(b) that the DGIR had failed to take into account the decisions of this court in *Prima Nova Harta Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* and *Sovereign Teamwork (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* where it was held that the cash contribution to obtain the release of the Bumiputera lots quota is a deductible expense under s. 33(1) of the ITA as it is expense wholly and exclusively incurred in the production of the taxpayer's income;

(c) that the DGIR disregarded the trite principle that one can only look at the language used and what is clearly said and nothing is to be read in or implied (see *National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue* [1993] 4 CLJ 339); and

(d) that the DGIR disregarded the trite principle that a provision in a taxing statute must be read strictly is one that is to be applied against the revenue and not in its favour. If there is any doubt, it must be resolved in the taxpayer's favour.

(ii) the Minister failed to ask the questions which he ought to have asked, *ie,* whether the said assessments have any legal and constitutional authority and in the alternative or additionally, whether the Minister may disregard the decisions of the courts if it was illegal, void, unlawful and/or in excess of authority on account of the Minister failing to take the following matters into account:

(iii) had the Minister asked the relevant questions and considered the relevant matters outlined above, he would have exercised his authority reasonably and fairly, and thus, would have taken steps to set aside the assessments given that it was issued arbitrarily and therefore illegally.

(iv) the decision of the Minister is tainted with irrationality for the following reasons:

(a) no reasonable Minister similarly circumstanced would have come to the same decision especially when no justification or basis for his decision not to exempt the arbitrarily raised taxes;

(b) the Minister had exercised his authority arbitrarily and/or mechanically without applying his mind to the facts and circumstances advanced in para. 8(i) above.

(c) the Minister had failed to take cognisance of binding superior court decisions on the interpretation and construction of tax legislation; and

(d) the Minister failed to appreciate the true effect and give effect to the provisions of the ITA which amounted to a contravention of art. 96 of the Federal Constitution.

(v) the Minister failed in his duty to give reasons for his decision and it is open for this court to conclude that the Minister had no good reason to give for the decision.

(vi) there was a denial of the applicant's legitimate expectation when the Minister failed to take cognisance of binding superior court decisions on the interpretation and construction of tax legislation.

The Test To Be Applied At Leave Stage

[9] This brings me to the duty of the judge hearing an application for leave. The law is trite. A person who is adversely affected by a 'decision', 'action', or 'omission', by a public authority is entitled to apply for judicial review to review its legality through any of the reliefs specified in para. 1 of the Schedule of the Courts of Judicature Act 1964. However, leave of court must be obtained before an application for judicial review can be filed. To obtain leave, the applicant has a threshold to clear. It is settled law that the threshold is very low and the test for such threshold is stated in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490 and the often-quoted case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478. The test is described in *WRP Asia Pacific Sdn Bhd* in the following words:

A Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must attached to the application though *ie*, unless the matter for judicial review is amenable to judicial review absolutely no
B success may be envisaged.

[10] Thus, leave will be refused if the application is frivolous or vexatious (*eg*, no good reason for the delay in making the application, or if the application is brought against a person immunised from such proceedings). If the application is not frivolous or vexatious, the next question is to
C ascertain whether the applicant has shown an arguable case to obtain the relief sought at the substantive stage. An arguable case according to *R v. Secretary Of State For The Home Department, Ex p Rukshanda Begum* [1990] COD 107 and adopted by the Supreme Court in *Tuan Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627 is one where there is:

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> ... **a point for further investigation on a full *inter partes* basis** with all such evidence as is necessary on the facts and all such argument as is necessary on the law. (emphasis added)

[11] Leave will be refused if no success is envisaged at the substantive
E hearing. In carrying out the exercise of ascertaining whether there is or is not an arguable case the judge is merely to peruse the material made available by the applicant and is not permitted to go into the merits in any depth. In cases where the Attorney General appears at the leave stage, or where the putative respondent is allowed to appear at the leave stage, the judge is
F required to adhere to the following constraint stated in *Rukshanda Begum* when considering the representations as to why leave should not be granted (per Gopal Sri Ram JCA (as His Lordship then was) in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927):

> The *inter partes* leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the
G judge at that *inter partes* leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, ... namely: if, taking account of a brief argument on either side, the judge is satisfied at there is a case fit for further consideration, then he should grant leave.

H **[12]** One other important aspect at leave stage concerns matters that are not amenable to judicial review. As stated in *WRP Asia Pacific Sdn Bhd,* leave will not be granted if the subject matter for review is not amenable to judicial review. Only if the matter raised is found amenable to judicial review does the question of clearing the low threshold *ie*, an arguable case arises. In this
I regard, matters not amenable to judicial review are of the kind that are non-justiciable *eg*, matters insulated by the Federal Constitution, written law or common law from judicial determination such as proceedings in Parliament,

or personal discretion of the Rulers (see *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2010] 1 LNS 1390; [2011] 1 MLJ 128 and *Tan Sri Musa Hj Aman & Ors v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Ors* [2021] 3 CLJ 87).

Applying The Test

[13] There were several objections raised by the Attorney General against the granting of leave. After considering the arguments of both sides, I am of the view that the applicant has failed to clear the low threshold test for leave to be granted for the reasons stated below. But, before I proceed it is important to keep in mind the following crucial facts:

[14] The Minister did not make a decision as requested by the applicant in the letter not replied to and it is the applicant who treated the non-reply as a decision by the Minister rejecting the request to exercise the power under s. 135 and/or s. 127(3A) of the ITA, and that the applicant prayed for two principal reliefs: (i) the first principal relief begins with the words, "an order for the Minister to exercise his powers under ss. 135 and/or 127(3A) of the ITA" and the second principal relief is for a declaration that the contribution is deductible under s. 33(1) of the ITA.

The Applicant Patently Not Entitled To The First Principal Relief

[15] The opening words of the first principal relief are: "an order for the Minister to exercise his powers". The powers referred to are housed in ss. 135 and 127(3A) of the ITA. The use of such words is to compel the Minister to exercise the said powers and, in the manner dictated by the applicant. The said order is therefore, in substance, an order in the nature of *mandamus*. It is certainly not an order for *certiorari*. It is trite that an order of *certiorari* is to quash the legal effect of a decision and this is not made out by the words employed in the relief sought. I have considered the submissions and agree with Federal Counsel that the order as framed is an order in the nature of *mandamus* which cannot in law be granted on the face of what had been pleaded by the applicant. As such, there is no arguable case for the first principal order to be investigated at the substantive stage.

[16] The reason the order cannot be granted is because *mandamus* does not lie to perform a discretionary power and only lies where the applicant has a legal right to compel the performance of a duty provided in the statute. The use of the word 'may' in both the sections confer discretionary power and not a duty on the Minister. For ease of reference the sections are reproduced below. Section 135 of the ITA state:

> The Minister **may** give to the Director General directions of a general character (not inconsistent with this Act) as to the exercise of the functions of the Director General under this Act; and the Director General shall give effect to any directions so given.

while s. 127(3A) of the ITA state:

> The Minister **may**, in any particular case exempt any person from all or any of the provision of this Act, either generally or in respect of any income of a particular kind or any class of income of a particular kind. (emphasis added)

[17] There is a plethora of authorities on the point and it is sufficient to cite the following instructive extract from MP Jain, *Administrative Law of Malaysia and Singapore*, 4th edn, at 615 (see Court of Appeal decisions of *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123 and *Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja* [2013] 1 LNS 280 where the same extracts from earlier edition of the book were applied):

> *Mandamus* is thus a very wide remedy which is available against a public officer to see that a duty is performed or carried out, in accordance with law. Enforceable by *mandamus* is a duty of a public nature, the performance of which imperative and not optional or discretionary. *Thus, if an officer has power, rather than a duty, and does not use such power, mandamus is not issued if the officer refuses to exercise the power for the wrong reasons.* (emphasis added)

[18] The decision in *Karpal Singh Ram Singh v. Ketua Hakim Negara* [2011] 4 CLJ 179 is a relevant and persuasive authority. There, an order of *mandamus* was sought directing the Chief Justice to respond to the applicant's request under s. 13 of the Judges' Code of Ethics 2009 to act in the manner dictated by the applicant. It was held that there must be under the law some duty cast upon the public officer before an order of *mandamus* can be made. If the public officer does not carry out his duty, the court will call upon him to perform that duty by an order of *mandamus*. The court found that s. 13, from the language used, did not impose a duty on the Chief Justice to act in a manner dictated by the applicant. The principle was lucidly stated as follows:

> What can be enforced through *mandamus* is a duty of a public nature, the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has power, rather than a duty, and if he does not use his power, *mandamus* is not issued to compel him to exercise his power.

Certiorari To Impugn "Decision" On Letter Not Replied To

[19] The applicant in its supplementary written submission dated 22 December 2022 and during oral clarification in court submitted that the order sought against the Minister was an order of *certiorari* and not *mandamus*. This submission is not correct and is against the clear wordings of the first principal relief sought in the application. As shown above, the applicant had

sought an order that was in the nature of *mandamus* on the complaint that the Minister did not reply to the applicant's letter dated 29 October 2021. It was for this reason that the order was sought to compel the Minister to exercise his powers under ss. 135 and/or 127(3A) of the ITA either to give directions to the DGIR to set aside the assessments or to exempt the tax levied *vide* the assessments.

[20] Notwithstanding, that *certiorari* was not prayed as a relief, I considered the written and oral submission made by counsel including the O. 53 statement and affidavit verifying facts to determine whether *certiorari* was in fact the remedy sought by the applicant. The argument was articulated in the supplementary written submission as follows:

> 5. In the present matter, this application is made in consequent to the respondent's omission, failure and/or refusal to respond to the applicant's letter dated 6 May 2021. It is the applicant's contention that the **respondent's conduct tantamount to a refusal to exercise its discretion** under ss. 135 and/or 127(3A) of the ITA to make a decision in response to the letter issued by the applicant. It is not denied by the Attorney General Chambers ("AGC") that to date, no response nor reasoning were provided for the refusal to exercise their discretion by the respondent pertaining to the said letter.
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> 6. The omission, failure and/or refusal of the respondent **to exercise its discretion** under ss. 135 and/or 127(3A) of the ITA is an unlawful act ("the decision") which the applicant had sought to challenge before this Honourable Court in the present application. **Henceforth, the applicant is seeking an order of *certiorari* to** quash the decision of the respondent on the grounds of *inter alia* illegality, irrationality and procedural impropriety.
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> 7. The applicant submits that the word 'decision' has a wide meaning. Reference is made to the Federal Court's judgment in the case of *Members of the Commission of Enquiry* ... whereby the Federal Court accepts that even a refusal to make a decision amounts to a decision.
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> 9. It is also the applicant's humble submission that a delay on the part of the respondent in making a decision would, on its own, amount to a refusal to make a decision. It is undisputed that to date, the applicant has not received a decision on their appeal letter issued to the respondent. (emphasis added)

[21] In essence, the applicant is treating the non-reply to its letter by the Minister as a 'refusal to make a decision' which is one of the two types of 'decision' susceptible to an order of *certiorari* according to the decision of the Federal Court in the *Members Of The Commission Of Enquiry's* case. It was said there that decisions susceptible to an order of *certiorari* are one of two types: type one where the decision-maker has made a decision and type two where the decision-maker has refused to make a decision in the following paragraph of the judgment:

A It is trite law that the purpose of an order for *certiorari* is to quash the legal effect of a decision. In England, in the case of *Council of Civil Service Unions v. Minister for Civil Service* [1984] 3 All ER 935 the House of Lords held that **for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision,** and, that decision must affect the aggrieved party by either
B altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy. (emphasis added)

[22] The applicant further submitted that there is a delay on the part of the Minister to make a decision and to date, the applicant has not received a decision on their appeal to the Minister (para. 9 of the applicant's
C supplementary submissions). The applicant then referred to the decision of *Zainal Hj Nasiruddin v. The Registrar Of Societies* [2012] 1 LNS 939; [2012] MLJU 1623 and *Workon Sdn Bhd v. The Director Of Lands And Surveys, Sabah & Ors* [1999] 1 LNS 40; [1999] 4 MLJ 177 in support of the submission.

D **[23]** Upon considering the submissions, I found that there was no inordinate delay on the part of the Minister and therefore, there was no decision by the Minister not to make a decision. In the absence of such a decision, there would be no 'decision' that is susceptible to *certiorari*. This in turn, would result in no arguable case for further investigation at the substantive stage. In coming to this conclusion, I had to first decide whether
E I could consider the relief of *certiorari* when the relief was not expressly pleaded and then decide whether there was a 'refusal to make a decision' that was susceptible to the remedy of *certiorari.*

[24] In deciding the first question, I kept in mind the established principle
F that a judge hearing an application for leave under O. 53 of the Rules of Court 2012 has to adopt a flexible approach when determining technical objections (see *Tang Kwor Ham* and *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525). Adopting this approach, I found that grounds had been pleaded in the O. 53 statement (paras. 3(a) to 3(d)) seeking to quash a purported decision of the Minister on
G illegality, irrationality and procedural impropriety indicating that the relief of *certiorari* was in contemplation notwithstanding that the relief was not prayed for.

[25] The grounds to quash the purported decision of the Minister have
H already been alluded to in para. 8 above. Since there are grounds raised for such a remedy, I am of the view that the applicant is entitled to contend that the application has established an arguable case for the relief of *certiorari.* And if the applicant is able to establish an arguable case, this court can make an order that necessary amendments be made to the cause papers to reflect the correct relief sought.

I

[26] Now, the grounds stated in the O. 53 statement alleged that the Minister had purportedly made a decision (as opposed to a refusal to make a decision) on the request of the applicant. It is alleged that the purported decision is riddled with errors and which decision is liable to be quashed on the grounds of illegality, irrationality and procedural impropriety. Herein lies the fatal flaw in the applicant's case.

[27] The incontrovertible fact shows that the Minister did not make any decision and did not reply to the applicant's letter. There is therefore no nexus between the grounds raised in the O. 53 statement and the relief of *certiorari*, given the fact that the Minister as decision-maker did not make a decision. The grounds the applicant raised in the O. 53 statement seeks to quash a fictitious decision. As such, no arguable case for investigation at the substantive stage is made out and one which is fair to say is also frivolous and vexatious.

[28] The second question was whether there was a decision by the Minister refusing to make a decision (as opposed to making a decision). The decision by a decision-maker refusing to make a decision is susceptible to an order of *certiorari* (decision in the second sense accepted in the *Members Of The Commission Of Enquiry's* case). In the instant case, the Minister did not reply to the applicant's letter where it was sought for the Minister to exercise his powers under ss. 135 or 127(3A) of the ITA in the manner dictated by the applicant. To recall, the applicant is also making a case that there is a decision by the Minister refusing to make a decision by virtue of inordinate delay.

[29] The principles in respect of a 'refusal to make a decision' were established in *Re Bukit Sembawang Rubber Co Ltd v. Sembawang Estates Ltd* [1961] 1 LNS 102; [1961] 1 MLJ 269 and followed in *Winsome Al-Yatama Sdn Bhd & Anor v. Pentadbir Tanah Kota Tinggi* [2015] 9 CLJ 110. The principles can be summarised as follows:

(i) a refusal to make a decision may be an absolute refusal in terms or there may be conduct amounting to a refusal. Where the respondent has not refused compliance in express terms, it is a question of fact whether his conduct evinces a clear determination not to comply.

(ii) there must be clear evidence of a refusal to act. This can be established primarily on the basis of an inordinate long delay as to amount to a refusal to consider and determine the application made to the decision-maker (*R v. Central Professional Committee for Opticians* [1949] 2 All ER 519).

[30] In my judgment, based on the facts alluded to by the applicant, there was no inordinate delay as the Minister was only given 14 days to respond and the judicial review application was filed two days after the deadline

imposed by the applicant had passed. This time frame does not evince a clear determination on the part of the Minister not to comply with the request. Thus, there is no clear evidence of a refusal to make a decision on, part of the Minister. To take the date when the application for leave was heard is fallacious in view of the fact that the Minister was already served with the instant application for leave. In the circumstances, there was no decision to qualify as a 'refusal to make a decision' which is susceptible to *certiorari*.

[31] For completeness, even if there is a decision that qualifies as a 'refusal to make a decision' that is susceptible to *certiorari* what can be quashed, if at all, is merely the decision refusing to make a decision. The case of *Zainal Hj Nasiruddin* cited by the applicant is instructive. There the applicant made an application to the Registrar of Societies ("Registrar") to register a political party. The Registrar did not make any decision either to refuse or to allow the application. It was held that an inordinate delay, without good reason, to make a decision amounted to a 'refusal' to make a 'decision'. Ravinthran J (as His Lordship then was) held that such inordinate delay was unlawful and *ultra vires* the Societies Act 1966 but to compel the Registrar to register the political party would be putting the cart before the horse as the Registrar has not made any decision as yet. Thus, an order of *mandamus* to compel the Registrar to make a decision whether to register the political party or not to register the political party within 21 days of the order was made.

[32] Thus, an application to quash a decision by a decision-maker not to make a decision must be accompanied by an order of *mandamus* to compel the decision-maker to make a decision on the matter. Without the accompanying order of *mandamus,* the applicant is only left with 'no decision' made by the decision-maker. Similarly, in the instant case, if the decision not to make a decision *ie*, decision not to exercise powers under ss. 135 and/or 127(3A) of the ITA, is quashed, an order of *mandamus* to compel the Minister to exercise his powers must follow. However, as shown above, no order of *mandamus* can be made as ss. 135 and 127(3A) of the ITA confers discretionary power and not a duty on the Minister. Therefore, the appropriate remedy is the pending appeals before the Special Commissioners to set aside the said assessments.

[33] One final matter to be addressed is the submission that the applicant was entitled to seek *certiorari* based on the decision of *United Allied Empire Sdn Bhd v. Pengarah Tanah Dan Galian Selangor & Ors* [2017] 8 CLJ 173; [2018] 1 MLJ 661. That case is easily distinguished as it is a case decided to finality with the acquisition of the applicant's land unlike the instant case where no decision was made. In *United Allied Empire Sdn Bhd* there was a failure to issue Form A *ie*, a mandatory requirement before land can be acquired under s. 4(1) of the Land Acquisition Act 1960 ("LAA"). The non-compliance was part of the mandatory acquisition process under the LAA. The Court of

Appeal found that the failure to issue Form A was an omission to comply with a mandatory legal dictate thereby amounting to an illegality. An order of *certiorari* was issued to quash the said acquisition of the land. That case concerns an omission to comply with a mandatory requirement where a decision made while in the instant case no decision was ever made.

The Non-applicability Of ss. 135 And 127(3A) Of The ITA

[34] Here again it is important to keep in mind the following crucial facts: (i) that the Minister did not make a decision in respect of the applicant's requests; and (ii) that the assessments made by the DGIR are illegal and/or unlawful *ie*, the tax cannot be levied in law. The applicant came to the Minister to set aside the assessments made by the DGIR by way of directions to be given to the DGIR to set aside the same or the Minister himself exempt the tax as assessed by the DGIR.

[35] In my view, the Minister has no power to do what the applicant is requesting him to do under ss. 135 and/or 127(3A) of the ITA. As such, there is no arguable case for investigation at the substantive stage for the reliefs prayed or not prayed for *ie*, *mandamus*, *certiorari* and declaration on the material presented to this court. My reasons are as follows.

[36] The ITA is structurally designed and is divided into parts and chapters to take care of specific areas. The power to set aside any wrongful assessment in law lies with the Special Commissioners by way of an appeal under s. 99 of the ITA. Sections 99 to 102 are in Chapter 2 under Part VI of the ITA which specifically provides for 'assessments and appeals'. The appeals envisaged in the sections are expressly directed against assessments made by the DGIR. The Special Commissioners are conferred with express power under para. 26 of the Schedule 5 of the ITA to discharge or set aside or amend any assessments made by the DGIR. An appeal against the decision of the Special Commissioners lies to the High Court (s. 102 read with para. 34 of the Schedule 5 of the ITA).

[37] Section 135 of the ITA is housed in Chapter 1 under Part X which solely concerns 'administration'. The purpose of the provision is for the Minister, when he is of the view it is required, to give directions of a general character as to the exercise of the functions of the DGIR, not inconsistent with the provisions of the ITA, to the DGIR. The directions are administrative and general in nature and certainly not directions specific in nature such as giving directions to the DGIR to set aside assessments he had made. Setting aside assessments is not a matter concerning 'administration' falling within the purview of s. 135 of the ITA. The power to set aside assessments is provided only by way of appeal to the Special Commissioners for otherwise the assessment becomes final and enforceable.

[38] Section 127(3A) of the ITA specifically confers power on the Minister to grant tax exemptions. The section is in Part IX of the ITA which concerns 'exemptions, remission and other relief'. Section 127(3A) of the ITA is an empowering provision conferring power on the Minister to exempt a person from 'any provision' of the ITA or exempt 'any income of a particular kind or any class of income of a particular kind'. The section envisages that the person requesting exemption is lawfully liable to pay tax. But, in the instant case, what was sought to be exempted was a tax that should not have been levied since it is the applicant's pleaded case that tax was illegally and/or wrongfully assessed in law.

[39] Now, it is basic law that 'income tax is a tax on income' and 'exemption only becomes relevant when there is chargeable income, but not otherwise'. This principle was reiterated in *Ketua Pengarah Hasil Dalam Negeri v. Perbadanan Kemajuan Ekonomi Negeri Johor* [2009] 5 CLJ 518 by the Court of Appeal referring to, amongst others, *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540 where it was held that a tax exemption is only given after liability to tax has been determined. In other words, there must be a first liability to income tax and then only the question of claiming exemption of the tax assessed could arise.

[40] In the instant case, the applicant is claiming to be exempted, not from lawfully determined tax but from illegally and/or unlawfully levied tax. That is not the purpose of s. 127(3A) of the ITA. Unlawfully levied tax is the jurisdiction of the Special Commissioners. As such, s. 127(3A) of the ITA is only applicable where there is a liability to pay lawfully assessed tax. Therefore, the exemption sought in the instant case is something that the Minister has no power of doing.

[41] For the above reasons, there can be no arguable case given that s. 135 of the ITA does not envisage the Minister giving directions to the DGIR to set aside the assessments (which under the provisions of the ITA is expressly within the jurisdiction of the Special Commissioners or the High Court) and that s. 127(3A) of the ITA does not envisage granting exemptions in respect of illegal and/or unlawful tax. Since, there is no power to do what is requested of the Minister, the second principal relief *ie*, the declaration that the gains arising from the applicant's disposal of shares fall within the scope of real property gains tax and not income tax has no basis to be granted against the Minister. In the circumstances, there is no arguable case for further investigation at the substantive stage.

Conclusion

[42] One last matter. It was submitted that exactly the same applications for leave had been allowed by the High Court and in one of those cases *ie*, *Peguam Negara v. CMMT Investment Limited* (Civil Appeal No. W-01 (IM)-

575-10-2021) the decision of the High Court was upheld. It suffices to say that the said cases are distinguishable on the admitted fact that the specific issue that arose for consideration in this case was not the subject matter of any of those cases.

[43] For the foregoing reasons the application for leave was dismissed.